IN THE

Supreme Court of the United States

ARTHUR THOMAS, *Petitioner,*
vs.
STATE OF ARIZONA, *Respondent.*

No. 88
October Term
1957

BRIEF OF RESPONDENT

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LIST OF AUTHORITIES

LIST OF AUTHORITIES (Continued)

KEY TO REFERENCES

Wherever reference is made in the Brief, the following abbreviations refer to the following supporting documents:

RT refers to the page of the Reporter's Transcript of Testimony in the jury trial of petitioner in the Superior Court of the State of Arizona, in and for the County of Cochise, consisting of eight volumes.

TR refers to the page of the Transcript of Record filed in this Court by the petitioner.

Appendix refers to the page of the appendix attached to this brief.

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STATEMENT OF FACTS

Since the statement of facts as contained in petitioner's brief is inaccurate, in many instances untrue, and commingled with innuendoes, conclusions and arguments of counsel, it is deemed advisable by the respondent to restate the actual facts established at the trial:

Around 10:00 a.m., March 17, 1953, a Mrs. Bonnie Fraker called at "The Hitching Post", a grocery store operated by the decedent in the area of Cochise County known as Kansas Settlement which lies about 12 miles south of Willcox, for the purpose of delivering milk. She discovered smoke coming out from under the door and fire in the bed in the back room and immediately drove her car to a nearby building then under construction to summon aid. In response to her request, three workmen including the petitioner returned to the store and the fire was extinguished, with but little if any help from petitioner. The latter was heard to say that he couldn't stand the smell of burning flesh and the inference is permissible that this remark was

made before the presence of the body had been discovered.

An examination of the interior of the store building showed the cash drawer was open, some small coins were scattered about, and numerous blood spots appeared throughout the building. It appeared that some object had been dragged across the floor from the cash register to the back room of the store where decedent lived alone and there a body was found.

The charred body, identified as that of Mrs. Janie Miskovich, was found lying on her bed in the back room of the store. The mattress had been nearly consumed by a smoldering fire. More coins were found near the blood-stained bed. Two purses hanging near the bed were open and empty.

The medical examination showed that, while deceased had received blows to the head from some blunt instrument, death had resulted from two stab wounds in the heart. A large butcher-knife slightly blood-stained was found on a meat block at the rear of the store.

Investigating officers followed a trail of blood spots out the back door of the store and over some adjacent hard ground to a point where they found footprints appearing in the soft soil of a plowed field. One of these officers followed this trail of footprints with accompanying blood spots a distance of approximately a half a mile to a point near the barracks-type house where petitioner and several other laborers and their families lived. Further bloodstains were found just outside as well as within the barracks.

Several witnesses testified that the 13½-inch footprints evidenced that they were made by shoes with smooth soles and the heels dubbed or "worn off" at the backside. A pair of brown suede shoes taken from under petitioner's bed on March 17th—identified as being the only footwear belonging to petitioner—were introduced in evidence. They match the footprints described above both as to length and the condition of heel and sole.

Two bloodstained canvas gloves were later found, one in an old stove immediately outside these living quarters, and the other in the open pit of a privy near the house on on the trail of footprints and bloodstains the officers had followed. Both of these were gloves for the right hand and of the brand and style sold to Mrs. Miskovich at 9:00 p.m. on the night of her death by a salesman—the last person to see her alive—who testified the gloves he then delivered were the only canvas gloves in the store. It was shown that in the supply of gloves remaining in the store the next day there were two left-hand gloves for which there were no mates. The glove found in the outhouse contained cuts across the little finger and deeper cuts across the next two fingers. When petitioner was apprehended it was found that his right hand had been cut, the cuts extending across the last three fingers. Medical examination revealed thhat the little finger and ring finger were severely lacerated and that the tendons of these two fingers had been severed. An expert from the Federal Bureau of Investigation testified that an analysis of bloodstains taken from objects and the floor by decedent's bed and from the kitchen floor in the barracks, as well as those obtained from the canvas gloves, were left by type "A" blood as were the bloodstains on a piece of Kleenex removed from petitioner's wounded hand by the doctor who treated it.

Between 3:00 and 4:30 P.M. of the day preceding the discovery of the body, petitioner purchased some wine, beer and candy in the store. At about 6:30 P.M. petitioner and Ross Lee Cooper—a 17-year-old Negro, and one of the inhabitants of the barracks—left their quarters to "go to the store." Petitioner and Cooper returned to the barracks within a short time and immediately left for the avowed purpose of going to see one "Louis Max". They returned from this trip in about thirty minutes and Cooper, according to the testimony of two other occupants of the barracks, did not leave again that night. Petitioner thereafter left by himself and was gone for about three hours. There was testimony from which the jury might infer that the homicide took place between the hours of 10:00 and 11:00 P.M.

On the night before the body was discovered, petitioner was wearing his usual work clothes which were the only clothes he owned. The next morning he put on an old and worn pair of overalls belonging to someone else. There was no evidence adduced as to what became of his clothes. When he returned to the barracks around noon he removed the brown suede shoes and placed them under the bed where they were later found. He then put on an old pair of shoes, which he found in a trash can, from which he cut the backs (counters) as they were much too small for his feet.

That afternoon a search was instigated for the unknown killer by Sheriff Howard aided by a number of other peace officers, on foot, and some local ranchers, at least two of whom were mounted. The petitioner was apprehended one and one-half miles south of the store and off the road a distance of some 300 yards, under a mesquite bush and partially hidden

under a pile of tumbleweeds. He was then questioned and in response denied killing the decedent, but said he knew who did and named Ross Lee Cooper. He also denied having changed shoes and claimed that he had "cut his hand on a can".

Upon being questioned by the County Attorney immediately upon his arrival in Bisbee from Willcox, a matter of only a few hours after his actual arrest, he freely answered questions which amounted to a continuous denial of any personal guilt in connection with the death of Mrs. Miskovich, and explained in detail how the killing took place, but accused a young Negro boy named Ross Lee Cooper as being the killer. It was not until the next morning when he was taken before the Justice of the Peace that he admitted guilt in any form.

To avoid repetition, the facts surrounding the arrest of the petitioner and his making of the statements complained of will be included in a later portion of this brief.

The respondent, the State of Arizona, herewith presents its views under the general classification adopted by the petitioner under the two "questions presented".

THE COURT HAS NO JURISDICTION TO REVIEW THE FIRST QUESTION PRESENTED BY PETITIONER FOR THE REASON AND UPON THE GROUNDS THAT THE APPLICATION FOR WRIT OF CERTIORARI TO THE STATE COURT WAS NOT TIMELY FILED

The record shows the following pertinent matters:

On June 19, 1953, petitioner was convicted of murder in the Superior Court of Cochise County, Arizona.

Petitioner appealed to the Arizona Supreme Court from that judgment and from an order denying his motion for a new trial.

On October 18, 1954, in Cause No. 1045, the Supreme Court of Arizona affirmed the judgment of the lower Court. *State of Arizona v. Arthur Thomas,* 78 Ariz. 52, 275 P. 2d 408.

On November 16, 1954, the petitioner's motion for a rehearing was denied.

On December 2, 1954, petitioner filed a motion for a new trial in the Superior Court, Cochise County, Arizona. Said motion was primarily based on the grounds of new found evidence. The motion, filed under the Rules of Criminal Procedure, 357(c), Sec. 44-2004(c), ACA, 1939, now Criminal Rule 310, was denied and petitioner appealed to the Arizona Supreme Court.

On June 28, 1955, in Cause No. 1072, the Arizona Supreme Court affirmed the lower Court's denial of a new trial. *State of Arizona v. Thomas,* 79 Ariz. 158, 285 P. 2d 612.

On September 16, 1955, the Arizona Supreme Court denied a motion for rehearing.

On October 24, 1955, petitioner filed application for a writ of certiorari in this Court, No. 330.

The ninety-day period in which such application could have been timely filed expired on February 15, 1955.

On January 16, 1956, the above-entitled Court denied the petition for writ of certiorari to the Supreme Court of Arizona. *Thomas v. State of Arizona,* 100 L. Ed. 221.

On the 8th day of December, 1956, petitioner filed application for writ of certiorari in this Court.

The ninety-day period in which such application could have been timely filed, in so far as the State judgment is concerned, expired on February 15, 1955. Rules of the Supreme Court, Rule 22(1).

This Court does not have jurisdiction to entertain an untimely petition for writ of certiorari. *State of Maryland v. Baltimore Radio Show,* 38 U.S. 912, 94 L.Ed. 562; *Hope Basket Company v. Product Advancement Corporation,* 342 U.S. 833, 96 L.Ed. 630, 72 S. Ct. 44; *Rust Land and Lumber Company v. Ed Jackson,* et al, 250 U.S. 71, 63 L.Ed 850, 39 S.Ct. 424; *Citizens Bank v. Mary Opperman,* 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330.

Obviously, any right that petitioner may have had for a review of the judgment of the State Court by this Court has been waived by the untimely filing of the petition.

THE FEDERAL DISTRICT COURT DID NOT ERR IN DENYING PETITIONER A WRIT OF HABEAS CORPUS ON THE MERITS AS PRESENTED IN THE AFFIDAVITS AND RECORD

It must be admitted that all of the issues determined by the Federal District Court had been pre-

sented to and determined adversely to the said petitioner by the Supreme Court of the State of Arizona. *State v. Thomas,* 275 P. 2d 408. Applications to District Court on grounds determined adversely to the applicant by State Courts should be refused without further ado, if the District Court is satisfied by the record that the State process has given fair consideration to the issues. *Brown v. Allen,* 334 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397. The District Court had before it the petitioner's petition with supporting documents, the response of the State of Arizona with supporting documents, the entire transcript of testimony of the original trial held in the Superior Court of the State of Arizona, in and for the County of Cochise, all briefs filed either by the petitioner or the State of Arizona before the Arizona Supreme Court and the United States Supreme Court. Likewise the United States Court of Appeals for the Ninth Circuit had access to the above material when it reviewed the action of the District Court and affirmed. *Thomas v. Eyman,* 235 F. 2d 775. Even had there been a material conflict of fact in the transcripts of evidence as to the deprivation of constitutional rights, the Federal District Court was justified in depending upon the State's resolution of that issue. *Brown v. Allen,* supra.

THE FEDERAL DISTRICT COURT DID NOT ERR IN NOT ORDERING A HEARING IN THE PREMISES

While the ordering of such a hearing in a habeas corpus proceeding is within the power of the District Court, there is no iron-clad requirement that it do so. All of the pertinent evidence and arguments were be-

fore the District Court with the exception of the following items which will be discussed:

The only matter which petitioner claims in this Court that he was prevented from presenting to the District Court was the testimony of the petitioner himself and the testimony of G. O. Hathaway, Superintendent of the Arizona State Highway Patrol, and the testimony of another State employee claimed to be a witness to the acts surrounding the arrest of the petitioner. Certainly the petitioner had ample opportunity to tell his side of the story during the trial, either before the jury or in the absence of the jury. His failure to do so may not now be used as a stone in the foundation of his claim of violation of his constitutional rights justifying habeas corpus. *Stein v. New York,* 346 U.S. 156, 97 L.Ed. 1522 73 S.Ct. 1077; *Brown v. Allen,* supra. Perhaps counsel's reluctance to place the petitioner on the stand during the trial was a fear of the disclosure of the prior criminal record of the petitioner, including a conviction for a violent crime resulting in imprisonment in the petitentiary of the State of Texas.

If petitioner's counsel did exercise unsound judgment in his conduct of the case, that fact is not sufficient for habeas corpus. *Soulia v. O'Brien,* 94 F. Supp. 764; *Yodack v. United States,* 97 F. Supp. 307.

In reference to the claimed testimony of Mr. Hathaway, notwithstanding statements in petitioner's brief to the contrary, *the record does not show that this matter was ever presented to the District Court in any form at any time.* No mention of Mr. Hathaway was made in the Petition for Writ of Habeas Corpus filed

March 1, 1956, (TR --4) nor in Petitioner's Motion and Petition for Further Hearing filed March 8, 1956, (wherein all of the proposed witnesses were actually named with a brief statement of the connection of each with the case (TR 5-6) nor in Petitioner's Amended Petition for Writ of Habeas Corpus filed March 9, 1956, (TR 7-13). We challenge petitioner to support the statements in his brief by any part of the record before this Court. The same applies to the proposed testimony of the other State employee claimed to have been a witness. Certainly on certiorari this Court is not required to examine the decision of the lower Court on pleadings, facts or theories other than those which were before the lower Court, nor was the Circuit Court of Appeals authorized to do so. *Ow Tai Jung v. Haff,* (C.C.A. 9th), 89 F. 2d 329; *Ex parte Tsugio Miyazono,* (C.C.A. 9th), 53 F. 2d 172; *Seals v. Johnston,* (C.C.A. 9th), 95 F. 2d 501. Exhibits and affidavits not presented to the lower Court in habeas corpus proceeding could not be used on appeal to determine that trial Court erred in denying release. *Garrison v. Johnston,* (C.C.A. 9th), 104 F. 2d 128, certiorari denied 60 S.Ct. 107, 308 U.S. 553, 84 L.Ed. 465, rehearing denied 60 S.Ct. 137, 308 U.S. 636, 84 L.Ed. 529.

The record presented to and considered by the District Court would impel any reasonable mind to conclude that the events surrounding the arrest of the petitioner did not force, influence or coerce him into admitting the crime to Judge Frazier. The proof of the pudding is in the eating. The petitioner did not admit the crime at the time of his arrest. He continued to deny it when questioned by the County Attorney later the same evening. (See statement taken at County Attorney's home on March 17, 1953, at 7:00

P.M., marked State's Exhibit 52 for Identification, attached to the Response to the Application for Writ of Habeas Corpus presented to and considered by the District Court and the affidavit of the County Attorney (TR 18-19 - Appendix, pages 1 to 32.) The sole reason the petitioner was taken to and questioned at the home of the County Attorney was because that officer was confined to a hospital bed and was encased in a full-length body cast as a result of an accident (RT 2006-2008). The first time the petitioner admitted guilt was in the calm atmosphere and sanctity of open court. If he was in a state of fear at that time, it was from something that happened between 7:00 o'clock the previous evening when he denied guilt and 11:00 o'clock the next morning when he admitted guilt to Judge Frazier. He doesn't contend that anything of that nature occurred during that period. He was advised the previous evening by the County Attorney that no promises of leniency were being given and no threats were being made, and that he didn't have to talk to officers unless he wanted to. *Petitioner himself admitted that he understood his rights in that respect.*

(See Appendix, pages 3, 31).

A bare consideration of the various statements of petitioner himself, in chronological order, destroys any possible inference that the events surrounding his arrest forced, induced, influenced, coerced or brought about his confession to Justice of the Peace Frazier.

Please consider:

First — his statement, when the fire was discovered, and before the body of Mrs. Miskovich was found, that

he couldn't stand the smell of burning flesh (RT 969). He didn't confess or say who did murder the woman.

Second — after he had been discovered hiding in the brush by the officers, when he informed them that he did not kill the woman, but knew who did (RT 2121 and 2246). Although at this time a rope had been unfortunately thrown around him by irresponsible onlookers, and petitioner claims the Sheriff said "Will you tell the truth, or I will let them go ahead and do this", *he did not confess.* He then showed the officers the way to Cooper, whom he accused of killing the woman—a trick as dastardly as the murder itself. He attempted to put the blame on a seventeen-year-old boy, a boy whom the rest of his Negro companions in the barracks called "Baby John" (RT 2167), a boy proved innocent because he was asleep in his bed at the time of the murder, as testified to by a woman who was forced to be up that night with her sick child and knew his whereabouts (RT 1286, L. 8-12).

Third — when Cooper was arrested. He again pointed out Cooper as the murderer. This occurred while Cooper and petitioner were roped the second time (RT 2223), *but petitioner still did not confess.*

Fourth — on the evening of his arrest, hours after the roping. He was questioned by the County Attorney in Bisbee, but still insisted that Cooper was the guilty one. *He still did not confess.*

Fifth — when he was taken into open court the next morning and admitted he had killed the woman with a knife.

Can it be seriously contended that incidents surrounding his arrest caused him to confess? He maintained his original story that another committed the crime until after he was brought to the county seat; until after he was advised by the County Attorney that no leniency was promised and no threats were being made to induce him to tell what had happened; until after treatment of his wounded hand; until after a night of rest. *After all of this—in open court—he first confessed.*

The setting itself at the Justice Court bears mentioning. The Sheriff, unarmed, brought petitioner in and he sat down (RT 1995). No one even took notice of him. Other persons were there calmly transacting their business (RT 2076 and 2081). When their business was completed, the Justice of the Peace proceeded to explain the defendant's rights (RT 2075). It was after he was informed of his right to counsel that he volunteered: "I don't need any lawyer. I am guilty. I killed the woman". (RT 1881 and 2075). Facts supporting petitioner's claim that the confession was forced and coerced simply do not appear. *Brown v. Allen,* supra.

Petitioner's contention that, if one confession is stricken as being involuntary, all other confessions must be stricken, is not the law. *Kermeen v. State,* 17 Ariz. 263, 151 Pac. 738; *Lyons v. Oklahoma,* 322 U.S. 596, 88 L.Ed 1481, 64 S.Ct. 1208; *Malinski v. State of New York,* 324 U.S. 401, 89 L.Ed 1029, 65 S.Ct. 781; *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280; *Stroble v. State of California,* 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599; *United States v. Bayer,* 331 U.S. 532, 91 L.Ed. 1654.

OTHER CONFESSIONS WERE REJECTED OUT OF AN OVER-ABUNDANCE OF CAUTION AND SHOULD HAVE BEEN ADMITTED AS VOLUNTARY.

Petitioner places great emphasis upon the fact that the trial court refused to admit into evidence additional confessions of the petitioner made on March 18th and March 20th as being involuntary. We submit that whether or not the trial Court was correct in excluding these confessions is still an open question as far as this Court is concerned. *Stroble v. California,* supra. There this Court examined the facts surrounding certain confessions, its decision having the effect of overruling the holding of the Supreme Court of California (*People v. Stroble,* 226 P. 2d 330) that a confession was involuntary. We submit that this Court may well do that here.

In line with the practice followed throughout the trial of "leaning over backwards" to show petitioner every possible consideration, the trial Court ruled out the later confessions although they could not have possibly been the product of the incidents surrounding petitioner's arrest.

Compare the following fact situation with those considered in the Stroble case and in the Lyons case.

Immediately after making his admission of guilt before Justice of the Peace Frazier, petitioner was taken to the home of the County Attorney where he was questioned by that officer in the presence of the Sheriff and a Deputy Sheriff. All proceedings were taken in shorthand by a young lady secretary attached to the Office of the County Attorney. Petitioner was again

advised of his rights not to make any statement if he didn't want to, and that no promises of leniency were being made nor were any threats (RT 1830-1831).

This statement was transcribed into typewritten form and was presented to petitioner on March 18th in the County Attorney's Office in the presence of Sheriff Howard, Deputy County Attorney Pidgeon and the young lady secretary, and Deputy Sheriff Haverty (RT 1859). The petitioner read the typewritten statement and signed it (RT 1860-1861). At that time no promises of leniency were made, no threats were made and no force was used to secure his signature (RT 1861).

On March 20th petitioner was again questioned by the County Attorney in the presence of the County Attorney, his two deputies, Under-Sheriff McRae, Deputy Sheriff Haverty, and official Court Reporter Neff. Also present was Percy Bowden, who was, and had been for thirty years, Chief of Police of the City of Douglas and who also was at the time an official Deputy United States Marshal (RT 1889). Neither Sheriff Howard nor any person present at the apprehension or arrest of the petitioner was present. All proceedings were taken by official Court Reporter Neff, who later transcribed them into typewritten form. Again no promises of leniency were made, nor were any threats made, nor was any force used to induce the petitioner to talk (RT 1891). During the questioning, petitioner voluntarily and willingly came over to where the County Attorney was lying on a hospital stretcher and illustrated his testimony on a plat or map with different colored crayons (RT 1892).

After this statement was transcribed into typewritten form, Percy Bowden, not a member of the Sheriff's Office but the Chief of Police of the City of Douglas and a Deputy United States Marshal, interviewed petitioner in the County Jail on April 1st in the fingerprint-room with only the two of them present (RT 1892). This officer told petitioner to read each one of the pages of his confession and, if it was true, to initial it, and, if it wasn't true, not to initial it. Petitioner proceeded to do just that and initialed each and every page, and did not refuse or fail to initial any page (RT 1893). This procedure of reading and initialing was not a hurried affair but consumed approximately an hour (RT 1893 and 1897). No promises of leniency were made to him, no threats were made to him, and no force was used (RT 1893). Petitioner signed his name in full on the last page (RT 1894). Petitioner knew that Bowden was a Chief of Police and a Deputy United States Marshal (RT 1893).

It is significant that, although petitioner complained to this Federal Officer about the pain in his cut hand, he said nothing whatsoever about any injury to his neck, nor did he say one word relative to the incidents surrounding his apprehension and arrest (RT 1899-1900).

Counsel for petitioner has complained bitterly of the actions of this Federal Officer as above described in the Superior Court of the State of Arizona, in the Supreme Court of the State of Arizona, in the Federal District Court, in the Circuit Court of Appeals and in this Court, but has yet to cite one authority holding that such action was illegal, improper or subject to any criticism whatsoever. On the other hand, considerable

authority exists in favor of the propriety of such action. (See *People v. Nelson,* 320 Ill. 273, 150 N.E. 686; *People v. Aguilar,* 140 Cal. App. 78, 35 P. 2d 137).

A well-reasoned case directly in point is *O'Loughlin v. People,* 90 Colo. 368, 10 P. 2d 543. There the Court allowed into evidence a statement secured by officers three weeks after the homicide was committed and after defendant's counsel had actually cautioned her not to talk. In *Stroble v. California,* supra, it also appears that certain of the subsequent confessions admitted into evidence were secured after counsel was appointed for the defendant.

In addition, in the case at bar, it appears that general counsel for petitioner had not been appointed, the Honorable W. Edward Morgan having received only a limited appointment from the trial Court on the 21st day of March, 1953, as follows:

> "THE COURT: Mr. Morgan, you represent the defendant in this arraignment?
>
> MR MORGAN: For the purpose of this arraignment, if I may be appointed by the Court, Your Honor.
>
> THE COURT: Do you have any money to employ counsel of your own choice?
>
> MR. THOMAS: No, sir.
>
> THE COURT: For that purpose the Court will appoint Mr. Morgan for the purpose of this arraignment. What are your initials, Mr. Morgan?"

(See certified copy of Reporter's Transcript attached to and made a part of the Appellee's Brief in *State of Arizona v. Arthur Thomas,* 275 P. 2d 408.)

We submit that the above undisputed factual situation supports the conclusion that the rejected confessions were actually voluntary in nature much more than does the factual situation in the *Lyons* case. The *Stroble* case is quite similar to the case at bar. In neither case did the petitioner suggest that the action of any officer during the actual taking of the confession was accompanied by force or duress. In each case it was contended that incidents prior to the taking of the confessions rendered them inadmissible. In the *Stroble* case the admitted physical abuse took place in the park foreman's office, only a short time before the confession was made, approximately an hour. Here any physical abuse of the petitioner, if in fact there was such abuse, occurred on March 17th, while the first rejected confession was taken on March 18th, and the second was taken on March 20th, which was reaffirmed in the presence of the Federal Officer on April 1st.

In neither case does it appear that the physical acts were accompanied by any demand that petitioner implicate himself. In the case at bar, even if the testimony concerning the Sheriff is taken in its strongest light in favor of petitioner, the most that can be made of it is that petitioner was urged to tell the truth, the Sheriff allegedly saying to him "Will you tell the truth, or will I let them go ahead and do this" (RT 2327).

In each case the petitioner readily and willingly answered questions in the prosecutor's office, and certainly the setting in the Cochise County Attorney's Office was less vulnerable to the charge of pressure than was the setting in the District Attorney's Office in California, where nineteen officers and five stenographers formed the interrogation team. (See *People v. Stroble,* 226 P. 2d 330, page 335).

In each case the record shows that the petitioner was anxious to confess to anybody who would listen, and as much so after he had consulted with counsel as before.

In each case it appears that petitioner's willingness to confess to the doctors in the *Stroble* case and to the federal officer in the case at bar, and in circumstances free of coercion, suggests strongly that each petitioner had concluded quite independently of any duress by the officers "that it was wise to make a clean breast of his guilt".

We would point out another significant fact in this connection. Nowhere in any court which has considered this matter has petitioner himself signed any affidavit as to his state of mind during the time the confessions were being given in support of his counsel's bare conclusions, nor has he himself verified any of the charges that his counsel continues to make.

We submit that the language of this Court used in the *Stroble* case fits the case at bar like a glove (to the same degree that the cuts on the gloves found near petitioner's house fit the cuts on petitioner's fingers):

> "In the light of all these circumstances we are unable to say that the petitioner's confession in the district attorneys' office was the result of coercion, either physical or psychological."

PETITIONER'S COMPLAINT OF NOT BEING TAKEN BEFORE MAGISTRATE IS FRIVOLOUS UNDER CIRCUMSTANCES.

Petitioner complains that he was not taken promptly to a committing magistrate and that he was taken

to a mortuary where he viewed the remains of the deceased. The truth is he was taken approximately fifteen miles north to Willcox to the nearest justice of the peace, who could not be located as he was out of town driving a school bus (RT 2227 and 1987); that the Sheriff then went by the mortuary and viewed the deceased (id.); that the petitioner was there for only two minutes (RT 2228); that he was not close to the body (RT 1987); and that another member of the Sheriff's party took photographs of the deceased as part of the investigation (RT 2316).

Petitioner was then taken to Bisbee, in an adjoining justice precinct, arriving there after the Justice Court was closed. He was taken before Justice of the Peace Frazier, sitting as a magistrate, the next morning, at which time he orally confessed.

This is not a case such as *Mallory v. United States,* 354 U.S. 449, 1 L.Ed. 2d 1479, 77 S.Ct. 1356, where a confession was secured from a defendant prior to his being taken to a magistrate. In the case at bar the confession complained of was not prior to being taken before a magistrate; it was made while he was appearing in the very court of the magistrate. The fact that the magistrate was not called to his office after closing hours is not an unusual practice in Arizona; and, since petitioner does not even contend that anything of an unusual nature occurred between the time he reached Bisbee and his appearance in the magistrate's court, such delay is of no special significance. See *State v. Jordan,* decided by the Arizona Supreme Court on January 14, 1958, (Pima County), in which is cited *Hightower v. State of Arizona,* 62 Ariz. 351, 158 P. 2d 156 (Maricopa County). Further, the Arizona rule seems to

be in accord with the decisions of this Court. *Gallegos v. State of Nebraska,* 342 U.S. 55, 96 L.Ed. 86, 72 S.Ct. 141.

DENIAL OF HATHAWAY ORDER NOT NECESSARY SINCE IT WAS NEVER ALLEGED IN DISTRICT COURT

The petitioner charges (Pages 15 and 16 of Petitioner's Brief) that nowhere in the record has the respondent denied:

1. That the Superintendent of the State Highway Patrol ordered the witness Selchow not to discuss the case with the petitioner or his counsel and only to respond to a subpoena of a duly constituted court and to only give testimony under oath at the trial.

2. That no process exists by which the petitioner could get a subpoena issued for the taking of the testimony of Selchow prior to the trial.

3. That the petitioner did not know what Harry Selchow would or would not testify to if called as a witness.

Since there are simply no allegations, either sworn to or unsworn to, in the pleadings filed by the petitioner in the District Court relative to the above points, there was no necessity of any denial by the respondent. Had there been any such allegations, they certainly would have been denied.

Apparently this mythical Hathaway order is an afterthought bred, born and reared after the District Court's decision.

MANY OF PETITIONER'S STATEMENTS OF FACTS ARE INCORRECT AND IRRESPONSIBLE AND NOT SUPPORTED BY THE RECORD

Petitioner's Brief is replete with statements of purported facts which are incorrect and are not supported by the record. As an example of such irresponsible assertions, we call the Court's attention to the following and challenge the petitioner to support his statements by the record:

1. That the petitioner is an ignorant cotton-picker.

2. That the community in which he lived was a predominantly Southern community, a community which still exercises Jim Crow practices.

3. That Sheriff Howard said "If you don't tell them you did it, I will let them hang you".

4. That another Negro was "dragged".

5. That Thomas and the other Negro were "dragged".

6. That the County Attorney advised witnesses called by the defense that they were to refuse to testify on the ground of self-incrimination.

7. That the petitioner was an ignorant farmhand.

8. That he had no friends or relatives to aid him.

9. That the trial Court refused to allow the petitioner to put on any more evidence concerning petitioner's putative lynching.

10. That petitioner had no friends, no attorney, no funds.

11. That the Sheriff threatened the petitioner that he either admit that he had committed the crime or he, the Sheriff, would let the mob go ahead and finish their roping of him.

12. That petitioner was alone without friends or counsel in the jail.

13. That petitioner was besieged for a confession in his jail cell even after counsel had been appointed for him, and was still so afraid that even the trial Court held that the confession obtained nearly a month after his arrest was involuntary as being still under coercion.

It seems unlikely that a person with a legitimate complaint would deem it necessary to resort to such practices. However, petitioner followed this course in both the District Court and the Circuit Court.

PETITIONER WAS OF AVERAGE INTELLIGENCE, AND NO STRANGER TO THE CRIMINAL LAW

It must be remembered that petitioner was no uneducated, weak-minded, young colored boy, as was the petitioner in *Fikes v. Alabama*, 250 U.S. 191, 1 L.Ed. 2d 246, 77 S.Ct. 281. He was twenty-seven years old; his education had actually progressed to the high-school level; he was of normal mentality and had had considerable experience with the criminal law from the time he was a juvenile and served over a year in the Gainsville Penitentiary in Texas; got into an altercation involving a gun in Conroe, Texas; was confined

to the brig once in 1942 and another time in 1946 during his term in the United States Navy; served fourteen days in 1947 for shooting dice; served fourteen months of a five-year sentence for stealing money in Sugar Land, Texas, (Pages 1, 14, 15, 16 and 17 of State's Exhibit 52 for Identification attached to the Memorandum and Affidavit in Opposition to Petition for Writ of Habeas Corpus, filed March 9, 1956, in the District Court.) (Appendix, pages 2, 21-25)

THE FEDERAL DISTRICT COURT DID NOT ERR IN CONSIDERING THE DOCTRINE ANNUNCIATED IN THE STEIN CASE AS WELL AS THE DOCTRINE IN THE LEYRA CASE

There is nothing in the record before this Court even indicating that the decision of the Federal District Court was based on the *Stein* case. The Court simply mentioned the matter in explanation of certain statements he had made when the application was first presented to him. Actually, the decisions in the two cases are not inconsistent. In the *Stein* case, as in the case at bar, the question of whether the confession was obtained by coercion was disputed. In the *Stein* case, it was disputed to the extend that the police denied any coercion whatsoever; the defendants did not testify to the contrary, although, after arraignment, injuries and bruises were found on their bodies. In that case the question of coercion was submitted to the jury under proper instructions as it was in the case at bar. On the other hand, in the *Leyra* case (*Leyra v. Demmo*, 347 U.S. 556, 74 S.Ct. 716) it was conceded that the first confession obtained by a State-employed psychiatrist was tainted by coercion and the only question was whether this defect extended to confessions

immediately following the first confession. In the *Stein* case there was sufficient evidence apart from the confession to support the verdict of guilty, as there is in the case at bar, while in the *Leyra* case it does not appear whether there was sufficient other evidence or not. In the case at bar a mere recital of the facts as found by the Supreme Court of Arizona (275 P. 2d 408) shows conclusively that there is ample evidence to sustain a conviction without the consideration of the confession to Judge Frazier. The facts in the *Leyra* case fully explain the decision. There a trained psychiatrist and hypnotist was introduced to a tired and ailing defendant as a medical doctor. This expert immediately began questioning which led to an admission of guilt. The defendant was asked leading questions, was given suggestions and was promised leniency. A police captain, who had been listening in an adjoining room, was called in immediately and continued to question the defendant, as did a business partner of the defendant. This Court held that a formal confession taken by two assistant state prosecutors immediately after this was coerced. This Court did not overrule the *Stein* case, did not even discuss it, and nowhere used language in the opinion at variance with the holding in the *Stein* case.

The most that can be said of the testimony of the witness Selchow is that it raised a conflict in the evidence. It is the only evidence that even hints that the Sheriff participated in the roping incidents to any degree. All other witnesses testified that the Sheriff did protect his prisoners. It is undisputed that he told the ropers to desist from their actions on each occasion, that he freed his prisoners from the rope, and that petitioner agreed in the presence of the newspaper

reporter that the Sheriff had "saved his life" (RT 1945). Selchow himself weakened on cross-examination and agreed that it was possible that he was mistaken in his belief that the Sheriff was the person who told the petitioner to tell the truth "or I will let them go ahead and use this" (RT 2330), due to the fact quite a few of the men were talking and it was difficult to single any one out.

Any conflict created by the testimony of Selchow simply brings the case at bar within the framework of the *Stein* case rather than the *Leyra* case.

The petitioner cites, as an excuse for not calling the witness Selchow prior to the admission of the oral confession, that the Court refused to allow the defense to introduce more evidence concerning the roping incident, notwithstanding the true fact that the Court informed counsel (RT 2067) at that time that he was "steward of your own case" and was to do as he saw fit. When objection was made to further testimony in the absence of the jury, *counsel for petitioner agreed that the objection was well taken* (RT 2069) and never even attempted to call the witness Selchow for testimony at that time. Under the circumstances he may not now complain.

PETITIONER WAIVED ANY OBJECTION TO THE ADMISSION OF THE CONFESSION BY FAILING TO OBJECT IN THE TRIAL COURT ON THE GROUND URGED HERE

When the matter was first gone into during the appearance of Justice of the Peace Frazier on the witness stand in the absence of the jury, (RT 1880-1881) no objection whatsoever was made. When the Justice

of the Peace was later placed on the witness stand in the presence of the jury, the only objection made was that the defendant had not been advised of his rights at the preliminary hearing, counsel for defendant citinf the Fourth Amendment to the Constitution of the United States, and Article 2, Sections 8 and 10 of the Constitution of Arizona, and "The Fifth Amendment". (RT 2073-2074).

Nowhere did counsel for petitioner object upon the ground urged in this Court. By failing to object on the ground urged in this Court, the petitioner has waived his rights to raise the question. *Sullivan v. State*, 47 Ariz. 224, 55 P. 2d 312.

The federal rule appears to be the same. *Hawkins v. United States*, (U.S.C.A. C.C.) 158 F. 2d 652; *Metcalf v. United States*, (U.S.C.A. 6th Circuit) 195 F. 2d 213; *Greer v. United States*, (U.S.C.A. 8th Circuit) 240 Fed. 320; *Stein v. New York*, supra.

Further, after objecting on an improper ground and on a different ground than urged before this Court, counsel for petitioner went ahead and cross-examined the Justice of the Peace and himself elicited the details of further statements made by the petitioner to the Justice of the Peace much more damaging than the statements objected to (RT 2083, lines 4-17).

IF THE CONFESSION OBJECTED TO HAD NOT BEEN ADMITTED THE JURY WOULD STILL HAVE KNOWN OF THE EXISTENCE OF A CONFESSION

Even if the testimony of Justice of the Peace Frazier had not been admitted, the jury would still have

known that petitioner had made a confession, as his own counsel told them so in open Court. (RT 1916, lines 2-6). Nowhere does the record show that counsel for petitioner moved to strike this from the record, nor did he move that the Court instruct the jury to disregard the statement. The only time the matter came up again was in the absence of the jury (RT 1920, lines 13-21). By reason of this, the jury took with them the definite knowledge that petitioner had confessed to the murder. Since, in point of time, this was prior to the testimony of Justice of the Peace Frazier, he added little to what they already knew.

SUMMARY OF ARGUMENT

Since petitioner did not file his Application for Writ of Certiorari within the time allowed by law and the rules of this Court, this Court has no jurisdiction to consider the first question presented by petitioner.

Under the rule in *Brown v. Allen,* supra, the Federal District Court was justified in denying petitioner's Application for Writ of Habeas Corpus without ordering a hearing.

The confessions given by petitioner after the one admitted in evidence were actually voluntary in nature, should have been admitted, and were rejected only because the trial Court was overly cautious in his efforts to protect the rights of petitioner.

Petitioner may not complain of not being taken before a magistrate before the confession admitted in evidence was given by him, since this confession itself was given by petitioner while appearing before the magistrate.

Neither this Court nor the Circuit Court was required to, or in fact authorized to, consider statements of factual matters contained in petitioner's brief before this Court which were not alleged in pleadings filed in the District Court and which the record shows were not otherwise presented to the District Court.

The record shows that innumerable conclusions and purported statements of fact contained in petitioner's brief are incorrect and are not supported by the record.

The record shows that petitioner was twenty-seven years old, of average high school education, and had served a considerable period of time in the United States Navy, and should have been familiar with criminal law and criminal process by virtue of his experience as a juvenile delinquent and his conviction of serious offenses for which he served periods of imprisonment.

The facts of this case bring it within the framework of the Stein case, the Lyons case and other cases in that group.

Petitioner may not claim in this Court that his rights under the Fourteenth Amendment have been violated when he did not make that objection in the lower Court prior to the admission of the confession, but there relied on rights defined by other constitutional provisions, both state and federal.

Prior to the time the confession was admitted to evidence, the jury knew that petitioner had confessed, because his own counsel told him so in open Court and at no time moved that the trial Court instruct the jury to disregard such statement.

CONCLUSION

Corrective power of this Court over state courts in criminal cases is narrower than that which it exercises over the lower federal courts. *Watts v. Indiana,* 338 U.S. 49, 50, 93 L.Ed. 1801, 69 S.Ct. 1347, 1357.

The respondent also believes that the following thought from *Stein v. New York,* supra, should be ever kept in mind:

> "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the state are also entitled to due process of law."

This has been stated in another way by Mr. Justice Cardoza in *Snyder v. Massachusetts,* 291 U.S. 97, 78 L.Ed. 67:

> " 'But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' . . .
>
> " 'There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We respectfully submit the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

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The Attorney General

JAMES H. GREEN, JR.
Chief Assistant Attorney General

WESLEY E. POLLEY
Special Assistant Attorney General

LLOYD C. HELM
Cochise County Attorney

JOHN G. PIDGEON
Chief Deputy County Attorney

Appendix

STATEMENT OF ARTHUR THOMAS

taken in Mr. Wesley E. Polley's home in Warren, Arizona, on the 17th day of March, 1952, at 7:00 o'clock p.m.

PRESENT:

Mr. Wesley E. Polley
Mr. Lloyd Helm
Mr. John Pidgeon
Mr. Jack Howard
Mr. V. McRae
Mr. William Saunders
Mr. Arthur Thomas
Mr. L. B. Neff, Reporter.

MR. POLLEY: Q What is your full name?
A Arthur Thomas, Jr.

Q Arthur Thomas, Jr.?

A Yes.

Q And how old are you?

A Twenty-seven.

Q How long have you been in Arizona?

A I came to Arizona in November.

Q Of last year?

A Yes.

Q And what are you doing for a living?

A I have been doing farm work, picking cotton and picking maize, and I worked for a fellow over there, Mr. Delbert.

Q Where did you come from?

A Came from Conroe, Texas.

Q Were you born in Texas?

A Yes, in Beaumont.

Q Did you go to school at all?

A Yes.

Q How far?

A I got in high school.

Q And how old did you say you were?

A Twenty-seven.

Q Now you know that I am the County Attorney of this county here, and all of these gentlemen around here are either Deputy Sheriffs or Deputy County Attorneys. I want to ask you about this occurrence in Kansas Settlement. I am not going to make you any promises if you do talk to me, and I am not going to make any threats if you don't talk to me. Whatever I ask you I want you to tell me freely, and I want you to tell me the truth.

How long have you known this Cooper boy?

A The first time I saw him was in '51.

Q Was he here in Arizona before you came or —

A No, sir, we came together.

Q Are you married?

A Yes, sir.

Q Is he married?

A No, sir.

Q When was it that you first came to the community over there called Kansas Settlement?

A That was in November, too.

Q When was it that you first saw Mrs. Miskovich?

A It was in November.

Q Was she running the store there at that time?

A Yes.

Q How far does this Cooper boy live from you?

A We both stay in the same place. We stay in this army barracks, and the fellow let us stay there because we was working for him.

Q Then you and Cooper actually live in the same house, is that right?

A Yes, sir.

Q And how far was this house from the Miskovich store?

A I would say it is about a quarter of a mile, maybe a little better.

Q When did you first see Cooper yesterday?

A I saw him all day yesterday excusing yesterday morning when I was working and he was at home then. He wasn't working yesterday morning.

Q Well, did you see him yesterday afternoon?

A Yes, sir. I wasn't working. It rained and we didn't get to work.

Q And where did you see him?

A At home.

Q Did you go down to the Miskovich store at all?

A Yes, sir.

Q When?

A I went down there yesterday, and then me and him went down last night together.

Q About what time did the two of you go down there last night?

A It was about — I would estimate about 7:30, 8:00 o'clock.

Q Did she ordinarily stay open, keep the store open at night?

A No, sir.

Q Well, was the store open last night when you went down there?

A No, sir.

Q Did you get in the store?

A Yes, sir. I got in after I heard her holler. I went around the back the way he went in. I went around and grabbed him, tried to take the knife away from him. That is where I got my fingers cut.

Q Let's take this a step at a time. How did you get from your place to the store? In an automobile.

A No, sir. Walked.

Q The two of you walked down there?

A Yes.

Q And as you got to the store, did you stay with Cooper all the time, or did he go around the back and you stay in front?

A No, sir. I stayed right out in front at first.

Q Was there any discussion between you as to what you were going to do at the store?

A He told me he been going down there late and getting beer, late after the store been closed, and that

is what we were supposed to be down there for, and he told me, "You stand there at the front there and I will go around in back and see if she will let me have some beer."

And I told him, "All right." And I was standing there and I heard her scream.

Q Did you hear her scream after he walked around the back?

A Yes, sir.

Q And after you heard her scream did you go around the back?

A I went around the back.

Q And how did you get in?

A She had the door open.

Q The back door?

A Yes, sir.

Q What was Cooper doing at that time?

A He had a knife in his hand, a long knife, and he had it drawed back, and I grabbed his hand up by the handle of the knife, and when he jerked down this way the knife slipped out of my grip.

Q What kind of a knife was it?

A It was a butcher knife.

Q Where did he get it?

A I don't know, sir.

Q Did he have it when he walked down to the store with you?

A No, sir, never been a knife like that in the house up where we was staying.

Q Would you know the knife again if you saw it?

A Yes.

Q Is this it? (Indicating.)

A Yes. If that is not it, it is one just like it.

Q In other words, this knife that I am holding in my hand looks like the knife that Cooper had?

A Yes, sir.

Q Well, when you first went in was he trying to stab her with the knife?

A Yes. He was standing up over her. She was laying on the bed then. He was standing up over her, and had the knife drawed back. He might have stabbed her before then, but he had the knife drawed back, and I asked him what was he doing. He told me to get out, so I grabbed him then, and tried to take the knife away from him, and he cut me then.

Q Well, what part of the knife did you grab?

A I had hold to the handle part at first, right up to the handle. He had the handle and I caught right up over his hand and part of the handle, and tried to hold it, but he jerked up on it and knocked my grip loose there and the knife just came right up and cut my finger.

Q Were you able to get the knife away from him?

A No, sir, I didn't get the knife away from him.

Q Did you actually see him stab her with the knife?

A No, sir, I didn't actually see him stab her with the knife.

Q Did you see any blood coming from her?

A Yes, sir.

Q And where was it coming from?

A It seemed like it was coming out of her mouth. Mouth, I would say, because I had taken a quick look at her and tussled with him then. After he cut me I run then. I run to the house to get me something. I thought maybe he had gone crazy, and I went across the field. I didn't go the way we came.

Q How did he leave, do you know?

A No, sir. I went on in front of him. After he cut me, I left. It was about thirty minutes later when he came to the house.

Q What did he say then?

A He didn't say nothing.

Q Didn't you ask him about what had occurred?

A Yes, sir, when I talked to him, but he wouldn't say nothing.

Q He wasn't drunk, was he?

A No, sir, I wouldn't say he was drunk, because he hadn't been drinking over two cans of beer.

Q About when did he drink those two cans of beer?

A About 5:30 or 6:00.

Q Did you have anything to drink?

A Yes, sir.

Q What did you have to drink?

A Me and another boy had a little drink of wine, and that was all.

Q About what time?

A About the same time; about 5:30, 6:00 o'clock.

Q When you say, "a little drink of wine," what do you mean? About how much did you have?

A It wasn't quite a half pint in a fifth bottle. Just a little bit in there, and me and him drank it up.

Q Would you state that it was a quarter of a pint?

A Yes, I would say it was a quarter of a pint.

Q But in any event when you and Cooper got down to the store you weren't drunk in any way, were you?

A No sir.

Q You knew what you were doing?

A Yes, sir.

Q And so far as you know he knew what he was doing?

A Yes, sir.

Q How long was he in the store when you heard the scream?

A About five of six minutes.

Q Now this back door, did it open into the storeroom, or did she have a little bedroom there or something?

A Yes, sir, that is what is was. She had a little bedroom in the back, and when you go from the back to the front it don't have no door there, just blinds.

Q When you first saw her then, she was on the bed?

A Yes.

Q And he was standing over the top of her?

A Yes, he was standing over her with the knife drawed back.

Q And that was the knife that I have just shown you?

A Yes, or it was one just like it if it wasn't it.

Q Did you see any blood coming from the front of her? Her chest?

A Well, it looked like it was coming from the mouth. I didn't see none from the chest.

Q Well, do you mean to tell me that you walked in there after she screamed?

Yes, sir. I ran in there. I didn't walk in. I ran in. I ran all the way from around to the front, and ran in the back door there.

Q And when you ran in, Cooper was over the top of her with this big butcher knife?

A Yes.

Q And you tried to get it away from him?

A He wasn't on the bed. She was on the bed and he was standing up beside the bed.

Q That is right, but he was trying to stab her with the butcher knife?

A Yes.

Q And you tried to take the knife away from him?

A Yes.

Q But you couldn't take the knife away from him?

A No, sir.

Q And then you ran?

A Yes.

Q But you left her to be killed by him?

A I didn't think he was going to kill her or anything like that.

Q What did you think he was doing with the butcher knife about a foot long?

A It didn't occur to me what would happen.

Q And then you say you cut across the field and went home, is that right?

A Yes.

Q And it was about a half hour before he came home?

A Yes, sir, after I got home. About a half hour.

Q And when he came in you tried to talk to him?

A I tried to talk to him, asked him what was he doing, and what was he standing up over her with the knife for. I asked him, "How come the blood was coming from her mouth?"

Q What did he say?

A He told me he didn't want to talk to me. He didn't have nothing to say. So I didn't say nothing else to him until today at dinner.

Q About what time was it when the two of you were talking in your house?

A In the house? It was pretty close—it was pretty clos to 9:00 o'clock, if it wasn't 9:00. It might have been a little after 9:00. We haven't got no clock in the house.

Q What did you do? Go to bed?

A Yes, sir. I went to bed.

Q You never did get any satisfaction out of him as to why he had the knife and why the blood was running out of her mouth?

A No, sir, I didn't say nothing else to him.

Q Did you get up this morning?

A Yes, sir. I never did go to sleep. I was laying across the house.

Q Who all lives in that house?

A Cooper, a boy named Davis, and another lady, and a fellow named James Lewis and my wife and myself; six of us.

Q Where did you eat breakfast this morning?

A I ate breakfast at home, sir.

Q Where did Cooper eat breakfast?

A At home.

Q With you?

A No, sir. This other lady there, she cooks for Cooper and those other two boys, and my wife cooks for me.

Q Did you talk to Cooper about this any more from the time you got up and ate breakfast this morning until noon?

A No, sir, I didn't say nothing to him.

Q After you got through eating breakfast, where did you go?

A I went to work.

Q You went to work?

A Yes, sir.

Q Where?

A I was working out there for a lady that bought a farm. That bought a farm. Miss Beard. She came from Texas.

Q Miss who?

A Miss Beard.

Q How do you spell that?

A I don't know how to spell it.

Q Was Cooper working in the same place?

A No, sir. He was working for a fellow, T-Bone Ranch. I don't know who he was — owns it.

Q After breakfast, when did you next see Cooper?

A At lunch time. He was eating dinner.

Q Where were you having dinner?

A At home.

Q At home? Did you say anything to Cooper then about what happened last night?

A No, sir. I just asked him one thing. Asked him if he was going back to work, and he said "yes." And he got up and left and went back to work.

Q You never asked him any more about what happened last night?

A No sir; I was intending to get him off by himself and ask him, but every time I said anything to him he brushed me off and I never had a chance to say nothing to him.

Q What did you do?

A After he left after dinner?

Q Yes.

A My wife told me she was feeling bad. She was pregnant and I said, "I am going down to Max' and get his truck to take you to town." And I said, "While I am up there I will have my hand fixed up."

She said, "All right," so I left and I started down that road going down to his house, and when I got down by Mr. Kempsons place—he has got a big farm. I usually cut across the woods there to Max' house, and I was going across there, it is mesquite bushes there, and when I got started out there I saw—looked up and saw a fellow with a gun and a dog, and I tried to hide then.

Q Why?

A Because I was scared. To tell you the truth, I was scared.

Q What were you scared of?

A I don't know, see, because one thing I was scared of being killed for something I didn't do, and all of that.

Q What do you mean, for something you didn't do?

A I knew what it was all about when I saw them coming.

Q You knew that those officers were out there and that dog was out there as a result of what happened

to Mrs. Miskovich last night, didn't you?

A Yes, sir.

Q And when you realized that you got scared, didn't you?

A Yes, sir.

Q And you tried to hide, didn't you?

A Yes, sir, I tried to hide.

Q And if they hadn't looked in that particular bunch of tumble weeds and brush you would have got away, wouldn't you?

A No, sir. I was going to Max'. That was all the further I was going.

Q Why did you try to hide from the officers?

A I didn't know whether they was officers or not. I was just scared. I couldn't see their badges.

Q You saw the guns, didn't you?

A Yes, sir.

Q How close were you to them?

A When I first saw them I was about a block and a half off, when I saw them.

Q But you could see their guns?

A Yes, sir.

Q And you could see the dog?

A Yes, sir.

Q You knew they were hunting you, didn't you?

A I didn't know exactly they was hunting me, but I knew they was hunting somebody.

Q When did you first find out that Mrs. Miskovich was dead?

A Well, it was this morning. I was over there and a lady came up in a car and said the store was on fire, "would you all come down and help me put it out?" And me and these two fellows there I was working with, we got in the car with her and went down there. That is when I found out she was dead.

Q You went back to the store this morning?

A Yes, sir.

Q And was the place on fire?

A Yes, sir.

Q And did you see the body then?

A No, sir, I never did look on the inside.

Q When you first found out she was dead you knew what killed her, didn't you?

A Yes, sir. I had an idea what killed her. That is what I wanted to talk to him about. I was going to tell him if he didn't go up and tell the police I was going to the police myself.

Q About what time was it you went to the store this morning?

A It was about ten after ten.

Q Ten after ten?

A Yes.

Q And you knew that she had been killed at ten after ten this morning?

A Yes, sir, I knew she was killed then.

Q And you knew in your own heart what had killed her. That is, that Cooper had killed her the night before, didn't you?

A Yes, sir, that is what I was thinking.

Q But you didn't report it to anybody?

A No, sir, I was scared.

Q That you were going to talk to him about it at noon, but then you didn't talk to him, is that right?

A Yes, sir, I did, but he wouldn't talk with me.

Q Now you say he wouldn't talk to you about it at noon. You just tell me what you said to him.

A No, sir. I asked him, I said, we all called him Baby John. We don't call him Cooper. I said, "John are you going back to work?"

He said, "What do you care? You just watch me and see." And he got on the trailer and went back to work.

Q That is all you said to him about the killing of Mrs. Miskovich?

A No, sir. I told him I wanted to talk to him.

Q I want you to tell me exactly what you said to him.

A I asked him was he going to work then. He asked me, just watch him and see what he would do. I told him I want to talk, and he went on outside then and got on the trailer and went on back to work.

Q And you still didn't report it to anybody?

A No, sir, I didn't say nothing.

Q All right. Now see these shoes over here?

A Yes, sir.

Q Whose shoes are those?

A Those are my shoes.

Q All right. The officer found them under your bed this morning, didn't he?

A Yes, sir. Well, I guess it was this morning. I thought it was this evening.

Q Well, sometime today he found the shoes?

A Yes, sir.

Q All right. Now who wore those shoes last night?

A I didn't even have on those shoes last night? I put them on yesterday after it was raining and got cement on them and put them in the kitchen. When I got up this morning I put them on when I first got up this morning, and this hand was still bleeding when I put them on.

Q What shoes did you wear last night?

A I haven't got them now.

Q All right. Where are they now?

A I don't know where they is.

Q Well, now I want you to tell me the truth.

A Yes, sir.

Q Now didn't you tell the sheriff that Cooper wore those shoes last night?

A Yes, sir. I knew he had wore them after I looked at them. I knew he had wore them.

Q Then Cooper wore those shoes last night, didn't he?

A Yes, sir.

Q And he wore those shoes down to the store when the two of you went down there, didn't he?

A No, sir, he didn't have them on then. I had them on then, when we went to the store the last time, but he had them on before then. I put them on after we came back to the house.

Q All right. But the time you went to the store, 7:30 or 8:00 o'clock, these shoes right here you had on, didn't you?

A Yes, sir, I had them on.

Q And at the time that you were wrestling with Cooper over this knife, you had those shoes on, didn't you?

A I had the shoes on, yes.

Q And when you left the place and ran across the field, you had those shoes on, didn't you?

A Yes, sir, I had shoes on.

Q Have you ever been in trouble before?

A Yes, sir, I have been in Gainesville.

Q What for?

A I went to Gainesville for stealing.

Q What kind of a sentence did you get?

A No, sir, I was just a juvenile then.

Q That is not a juvenile prison. That is a prison. What were you charged with, stealing something?

A Yes, sir.

Q What was it?

A It was some money.

Q How much?

A About $30.00.

Q How much?

A About $30.00.

Q And when was this?

A In 1940.

Q And what sentence did you get? What term did the Judge say you had to serve?

A No, sir. Well, I can't say. He just said, "I sen-

tence you to the State Training School for Boys," and I stayed down there one year and three days.

Q Have you ever been in any other trouble?

A Yes, sir. I got a little mixed up here in a little trouble back a while ago over a pistol.

Q Where?

A At home. In Conroe.

Q How do you spell that?

A C-o-n-r-o-e.

Q In Texas?

A Yes, sir.

Q Where is that?

A That is about 35 miles north of Houston.

Q Did you serve any time over that?

A No, sir.

Q Well, what happened? I mean, I don't mean what happened when you got in trouble, but what was the result of your court action?

A Well, see, the way it was me and a fellow was having a fight and he drew the pistol, and I taken it away from him, and I carried it to an officer and gave it to the police officer. When they taken it to trial they didn't have no court action against me at all.

Q You didn't serve any time that time at all?

A No, sir.

Q Any other time?

A No, sir.

Q Now I want to be fair with you. We are going to send your fingerprints off to the F.B.I. so we are going to get your record and there is no way of your getting out of it, so you may as well tell me everything.

A Yes, sir.

Q What other times have you been in trouble?

A I went to the brig twice while I was in the navy.

Q When was that?

A I went the first time in '42. The last time in '46.

Q For what?

A I was AWOL then.

Q Both times?

A Yes, sir.

Q What other times have you served jail sentences?

A I served one jail sentence in '46—'47 it was. It wasn't '46.

Q Where?

A In Conroe.

Q For doing what?

A Shooting dice.

Q Shooting dice?

A Yes, sir.

Q How much did you serve that time?

A I stayed 14 days.

Q What other time?

A (No answer.)

Q Think hard. Have you ever served any time in any State Prison?

A Yes, sir.

Q Where?

A I served some time in Texas.

Q What year?

A '47, sir.

Q And what for?

A Stealing.

Q Stealing what?

A Money.

Q Well, where was this prison?

A It was in Sugar Land.

Q Sugar Land, Texas?

A Yes.

Q This is not the one you served in Gainesville, it?

A No, sir.

Q How long did you serve in Sugar Land?

A Well, I had five years, but I got out in — it was about 14 months.

Q But you were sentenced to five years?

A Yes, sir.

Q And you served 14 months of it?

A Yes, sir.

Q All right. Have you served any time in any other State Penitentiary?

A No, sir.

Q Any Federal Penitentiary?

A No, sir.

Q How long did you say your have known this Cooper boy?

A I have known him since '51.

Q What trouble has he been in?

A I don't know, sir.

Q Has he been in any trouble since you have known him?

A See, sir, I wasn't around always from '51 up until now. I was around about three months in '51, and in '52 I didn't see him lately up until November when we started coming down here.

Q Did Mrs. Miskovich live in that store there all by herself?

A Yes, I guess so.

Q You knew that she did, didn't you?

A No, sir. I didn't know whether she lived there by herself or not, because I had never been down there at night.

Q You say you had never been down there at night?

A Yes.

Q Well, Cooper had been down there before, hadn't he?

A Yes, sir. He used to go down there and get beer. You could tell when the store was closed. You could walk on the outside and the light would be cut off. I said, "You can't get no more beer. The light is cut off."

He said, "I can get it," and he went down to get it.

Q You never have had any insanity in your family, have you?

A Not as I know, sir.

Q When you went to school you didn't have any trouble doing the ordinary school work, did you?

A No, sir.

Q As far as you know you are a normal person as far as your mentality is concerned, aren't you?

A Yes, as far as I know.

Q When you saw Cooper standing over the top of Mrs. Miskovich with this knife in his hand, she didn't

have anything in her hands, did she?

A No, sir.

Q Just the two of them there, and he had this long butcher knife and she didn't have anything?

A No, sir.

Q When you first walked in did you say that she was on the bed?

A Yes.

Q Now was she laying down in the bed like I am now, or how was she?

A No, sir, she wasn't laying down like. She was laying kind of across the bed or something.

Q And he was standing up?

A Yes, sir, he was standing up and leaning over the bed when I grabbed him.

Q And he had the knife in which hand?

A He had the knife in his — right hand. In his right hand, because I am righthanded myself, and that is the way he is.

Q Didn't his hand pretty well cover the handle of that knife?

A Yes, it pretty well covered it.

Q And you grabbed the blade of the knife?

A Yes, sir. I grabbed a little part of the handle and his hand, and had just a little bit, my two fingers

there, on part of the blade. That it how I got cut, when he snatched it, by me having a little piece of the blade.

Q How did your fingerprints get on the handle of the knife?

A My fingerprints on the handle of the knife?

Q Yes.

A When I grabbed hold of it, I guess.

Q It couldn't have been. You said that his hand was covering the knife. How did your fingerprints get on the handle?

A I said his hand was covering the knife, part of the knife, and it was just like that there. (Indicating.) Right up around the top edge, and I grabbed hold and I grabbed what was left and had one or two of my fingers, had one of my fingers there over his, and I grabbed his like that there. That is the way I grabbed it; just like that. (Indicating.)

Q So that is how you figure your finger prints got on the handle of that knife?

A That is the only way I can see it.

Q You had better start telling me the truth.

A I am telling you the truth.

Q No, you are not telling me the truth, because your fingerprints wouldn't be on the handle of that knife if you were telling me the truth. And don't give me that cock and bull story, because I am not going to believe it. When did you have that knife in your hand?

A I don't know any time my hand ever come in contact with that knife.

Q Now think hard.

A Yes, sir. I am thinking. My hand never come in contact with that knife. He had some white gloves he had on.

Q He had what?

A White gloves on. He had gloves on.

Q Where did he get them?

A I don't know. I thought maybe he brought them.

Q When did he have the white gloves on his hand?

A He had them on when I run back around to the store where he was when I heard the lady holler.

Q Did he have the white gloves on when he left you in fro t of the store?

A No, sir.

Q On the way down there from the house to the store did he say anything about he was going to put on some gloves?

A No, sir, he didn't say nothing. See, I was under the impression he was going around to get the beer like he always do.

Q But he didn't have any gloves on when he went around the back?

A No, sir.

Q But when you saw him standing over the top of bed with this knife he did have some gloves on?

A Yes, he did have them on.

Q Cotton gloves or leather gloves or what?

A Cotton gloves.

Q Did you have any gloves on?

A No, sir.

Q Maybe that is why your fingerprints are on that knife. Do you suppose?

A I don't know, but I don't wear no gloves even when I am working. Just don't ever wear none.

Q Well, do you imagine he put these white gloves on so that your fingerprints would be on that knife and his wouldn't, so that you would be hooked for this murder and he wouldn't?

A No, sir, I don't think that happened.

Q Well, what do you think about it now with your fingerprints on that knife?

A I don't know.

Q Well, he is a pretty smart boy, isn't he?

A No, sir, he don't act like it.

Q Well, I am going to let you go now for a little while. Now everything that you have told me has been the truth, hasn't it?

A Yes, sir.

Q And you swear to God that it is the truth?

A Yes, sir.

Q And everything you told me you have voluntarily told me, haven't you?

A Yes.

Q And you understand, like I told you when we started, that I am not making you any promises if you do talk to me; I am not making you any promises if you don't talk; and I am not making you any threats if you don't talk? You understand that?

A Yes.

Q And you understand that when you started you didn't have to talk to me unless you wanted to. Do you understand that?

A Yes.

Q All right. Just one second.

Well, now when you went down there this morning to the store, you knew from what you heard around there that she had been hit on the head and her skull fractured, didn't you?

A No, sir, I didn't know she had been hit on the head.

Q Well, when you went down there this morning how did you learn that she was killed?

A Well, I didn't know whether he stabbed her last night, but I knew she hollered and I figured he had hit her or something, but I didn't see what it is. All I know

was the corner of her mouth was bleeding, and this morning —

Q Wait a minute. Don't go so fast. What makes you think he hit her last night?

A By her screaming and I saw blood when I came in, saw blood coming out of her mouth.

Q But that is all that makes you think, believe that she was hit last night?

A Yes, sir.

Q Well, okay for the time being.

CONSTITUTION OF THE UNITED STATES

"Amendment (V.)

"No person shall be held to answer for a capital, or othedwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

CONSTITUTION OF ARIZONA

(Article 2)

"§ 8. *Right to privacy*

"Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"§ 10. *Self-incrimination; double jeopardy*

"Section 10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.'